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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

WAYNE ANTHONY BUSHORE,

Defendant and Appellant.

D054823

(Super. Ct. No. SCE279630)

APPEAL from a judgment of the Superior Court of San Diego County, Louis R. Hanoian, Judge. Affirmed.

A jury convicted Wayne Anthony Bushore of assault by means likely to produce great bodily injury (count 1) (Pen. Code, § 245, subd. (a)(1)); making a criminal threat (count 2) (*id.*, § 422); vandalism under \$400 (count 3) (*id.*, § 594, subd. (a), (b)(2)(A)); battery (count 4) (*id.*, § 242); and child abuse likely to produce great bodily injury (count 5) (*id.*, § 273a, subd. (a)). Bushore was sentenced to three years custody on count 1, which was stayed pursuant to Penal Code section 654. He was sentenced to four

years in state prison on count 5, and two years, to run concurrently, on count 2. On count 3, probation was denied, and Bushore was sentenced to one year in custody, with 365 days' credit for time served. On count 4, the court denied probation and sentenced Bushore to 180 days in custody, and gave credit for time served.

FACTS

On April 14, 2008, Bushore went to a Denny's restaurant in La Mesa, California. The restaurant manager, Cynthia Metzger, observed Bushore acting "very indifferent . . . fidgety . . . laying [*sic*] down in the booth . . . getting up, speaking to himself." Bushore received his food order and then yelled across the restaurant that he wanted a to-go box. When Metzger and another employee brought the box, Bushore called Metzger a "fucking bitch" and told her he was going to shoot her between the eyes. Metzger, who was already in fear for her employees because of the way Bushore was acting, felt scared. Metzger was unable to determine whether Bushore possessed a weapon; however, because she was concerned that Bushore would "do something," Metzger removed the steak knife from Bushore's table. Metzger told Bushore to leave the restaurant. Bushore got up, screamed out that Metzger was a "fucking bitch," took magazines from a rack, and threw them at Metzger and her employee. The magazines hit and broke an eight- to nine-inch section of Formica on a cabinet door. Metzger continued to watch Bushore after he left the restaurant, noting that he appeared angry and upset. Metzger saw Bushore grab and throw a young girl into the street.

According to the girl's mother, Maria P., Bushore approached her and her two daughters and told them to "get out of the way." Maria P. and her daughters stepped to

the edge of the sidewalk to make room for Bushore to pass. As he did so, Bushore grabbed G.M., the older of the two girls, by her upper arms and pushed her into the roadway. The girl landed in the lane next to the sidewalk, where she saw a white car pass by her in the next lane. Maria P. said the car was four to five feet from her daughter, going 40 miles per hour. G.M. was shocked, panicked, and not moving. She began to cry. G.M. said, "He tried to kill me, he wanted to kill me."

Afraid for her daughter's safety, Maria P. pulled Bushore's clothing at the shoulder and began to strike him. Maria P. hit Bushore in the head with her handbag. Bushore hit Maria P. with his elbow, scratched her and shoved her toward the sidewalk. Maria P. did not fall, but landed on the ground in a kneeling position. Bushore walked away, as if nothing had happened.

After G.M. got back on the sidewalk, Maria P. and her two daughters went to a nearby trolley station, where they asked for assistance from police. Officer Jeffrey Chambers spoke with G.M., who was shaking and appeared frightened. G.M. told Officer Chambers that Bushore had pushed her into the roadway and that she had heard squealing of tires and saw a car coming towards her, although the car did not hit her.

Defendant testified at trial. He said when he went into Denny's he was in pain and laid down in a restaurant booth. At the time, he was angry and yelled "God darn Senator Mrs. Barbara Boxer to hell." Bushore claimed Metzger was rude and asked him to leave. Upset with the way he was being treated, Bushore took newspapers and threw them as he left the restaurant. Bushore denied ever encountering Maria P. and her daughters: "I didn't see them. I didn't talk to anyone, no, not at all, not in any way." Bushore said he

walked up the street and sat under a tree to rest. While resting, several officers arrived and took him into custody.

DISCUSSION

Appointed appellate counsel has filed a brief setting forth evidence produced in the superior court. Counsel presents no argument for reversal, but asks that this court review the record for error as mandated by *People v. Wende* (1979) 25 Cal.3d 436. Pursuant to *Anders v. California* (1967) 386 U.S. 738, counsel refers to as possible, but not arguable, issues:

- (1) Was there sufficient evidence to support the five convictions?
- (2) Did the trial court err in excluding evidence of Bushore's mental status or mental diagnosis?
- (3) Did the trial court prejudicially err in failing to give CALCRIM No. 301?
- (4) Could Bushore be convicted of both assault with great bodily injury and child abuse with great bodily injury when both counts involved the same victim?
- (5) Did the trial court abuse its discretion in denying probation?
- (6) Did the trial court abuse its discretion in sentencing Bushore to the middle term of five years in state prison on count 5 (child abuse)?

We granted Bushore permission to file a brief in his own behalf. He has not responded.

A review of the record pursuant to *People v. Wende, supra*, 25 Cal.3d 436, and *Anders v. California, supra*, 386 U.S. 738, including the possible issues referred to by

appellate counsel, has disclosed no reasonably arguable appellate issues. Competent counsel has represented Young on this appeal.

DISPOSITION

The judgment is affirmed.

IRION, J.

WE CONCUR:

HUFFMAN, Acting P.J.

McINTYRE, J.